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DISTRICT IV

October 8, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP2317-CR State of Wisconsin v. Alberto Trevino, Sr. (L.C. # 2011CF68)

Before Lundsten, Higginbotham and Sherman, JJ.

Alberto Trevino appeals a judgment of conviction for one count of repeated sexual assault of the same child, one count of first-degree sexual assault of a child, one count of attempted first-degree sexual assault of a child, and one count of causing a child to view sexual activity, following a jury trial. Trevino contends that the circuit court erred by restricting the defense's cross-examination of the victim's mother at trial as to her employment as a "gentlemen's club" dancer. He asserts that the court used an incorrect legal standard in determining that the victim's mother's employment was not relevant evidence in this case.

Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We summarily affirm.

Trevino was charged with multiple criminal counts based on allegations by the seven-year-old victim that Trevino had sexually assaulted her. At trial, the State played a recorded interview of the victim.

The victim's mother testified for the State. In a sidebar conference, defense counsel indicated she wanted to elicit testimony from the victim's mother that the mother worked as a dancer at "gentlemen's clubs." The State objected, and the circuit court questioned defense counsel as to how the nature of the victim's mother's employment was relevant. Defense counsel argued that the evidence was relevant to establish that the victim's mother worked a lot on weekends, to show a time line, and as to her supervision of her children. The court rejected that argument on grounds that all of those issues could be established without introducing evidence of the nature of the mother's employment. Defense counsel then argued that the evidence was relevant to establish an alternative source of the victim's knowledge of sexual information, as exhibited by the details she provided in describing the sexual assaults. Counsel argued that it was possible that the victim's mother's children would have access to inappropriate sexual information based on the mother's employment in the adult entertainment industry. Defense counsel conceded, however, that there was no evidence that the mother did, in fact, have any sexually explicit material in her home. The court determined that any connection between

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the mother's employment and her children's exposure to sexually explicit material was purely speculative, and that the nature of the mother's employment was irrelevant.

Relevant evidence is generally admissible; evidence that is not relevant is not admissible. WIS. STAT. § 904.02. Evidence is relevant if it has any tendency to make the existence of a fact having consequence to the determination of the action more or less probable. We review a circuit court's decision to admit or exclude evidence for an erroneous exercise of discretion. *See* ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. A circuit court erroneously exercises its discretion when it applies the wrong legal standard in reaching its determination. *See* ***id.***

Trevino argues that the circuit court erroneously exercised its discretion by excluding evidence of the nature of the victim's mother's employment. He contends that the circuit court applied the wrong legal standard for relevance when the court stated: "Without some evidence to support that connection there between mother's employment and possible source of sexual knowledge on behalf of the children, the Court determines that the nature of [the victim's mother]'s employment is not relevant." Trevino argues that the legal standard for relevance did not require Trevino to provide *evidence* of the connection between the mother's employment and the victim's source of sexual knowledge. Rather, Trevino points to ***State v. Alsteen***, 108 Wis. 2d 723, 324 N.W.2d 426 (1982), which explains that the legal test for relevance requires only a showing of "'a logical or rational connection between the fact which is sought to be proved and a matter of fact which has been made an issue in the case.'" ***Id.*** at 729-30 (quoted source and internal quotation marks omitted).

Trevino then contends that he did show a logical or rational connection between the mother's employment as a dancer at "gentlemen's clubs" and a possible source of the victim's sexual knowledge. He argues that the mother's employment in a "highly sexualized arena" is logically connected to the likelihood that the mother would have sexually explicit material in her home. He analogizes the likelihood of the mother having sexually explicit material at home based on her employment in the adult entertainment industry to a teacher being likely to have teaching material at home. He asserts that it would have been probative of the victim's source of sexual knowledge to establish whether the mother's places of employment sold pornographic material, whether the mother obtained any of that material or brought such material into her home, and whether she guarded her children's access to that material. We are not persuaded.

The problem with Trevino's argument is that he has *not* established a logical connection between the victim's mother's employment as a dancer at "gentlemen's clubs" and a likelihood that she would have had sexually explicit material at home that would have served as an alternate source of the victim's sexual knowledge. While Trevino asserts that it would have been probative to establish that the mother had sexually explicit material in her home and failed to guard her children from that material, that is not the evidence Trevino sought to introduce. Trevino conceded at trial that, apart from the mother's occupation, there was no indication that the mother actually had such material in her home.

We agree with the circuit court that employment as a dancer at "gentlemen's clubs" does not make it likely that one will have sexually explicit material at home. For example, to use the teacher analogy Trevino offers, we agree that a teacher may need to bring home teaching material in the form of textbooks and papers to grade; however, there is no apparent corollary

with respect to employment as a dancer at "gentlemen's clubs." Trevino has not explained why "gentlemen's clubs" dancers would bring home sexually explicit material as part of that job.

Because we determine that the circuit court properly excluded the evidence, we need not reach the parties' arguments over whether the error, if any, was harmless.

Therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals